QUARTERLY REPORT

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The **Quarterly Report** provides information on recent judicial and administrative decisions affecting publicly funded education. Should anyone wish to have a copy of any decision noted herein, please call Kevin C. McDowell, General Counsel, at (317) 232-6676, or contact him by e-mail at <kmcdowel@doe.state.in.us>.

In this report:

STATUTE OF LIMITATIONS AND DUE PROCESS HEARINGS UNDER THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT

The Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq.*, provides a due process hearing mechanism whereby parents or guardians and public agencies responsible for providing services can resolve disputes regarding identification, eligibility for services, appropriate educational placement, or any aspect of a "free appropriate public education."[1]

However, IDEA never placed any limitations on the time period between when the dispute arose and a due process hearing was requested. This lack of a "statute of limitations" has resulted in expansion of hearing issues to include individualized education programs (IEPs) from the remote past, challenging whether a student received a FAPE in years past under IEPs approved by the student's parent or guardian. The expansion of issues has had a corresponding effect upon the length of the due process hearing themselves.

Congress is aware of this problem. During the current reauthorization process, both the House and the Senate have approved versions that contain a limitations period. The House version (HR 1350) would prohibit the introduction of issues alleging violations of the IDEA that occurred not more than one (1) year before the hearing was requested.[2] The Senate version provides that "[a] parent or public agency shall request an impartial due process hearing within 2 years of the date the parent or public agency knew or should have known about the alleged action that forms the basis of the complaint, or, if the State has an explicit time limitation for requesting such a hearing under this part, in such time as the State law allows."[3] The Senate version also indicates that there can be exceptions to this two-year limitations period. These exceptions would include where the public agency failed to provide notice to the parent or guardian of the right to request a hearing, the public agency made false or misleading statements that delayed resolution, or the public agency withheld information from the parent or guardian.[4]

State Laws and Limitation Periods

Although the Senate version would defer to any State limitations period on requesting such hearings, most States do not have explicit statutes that govern such disputes in administrative law. In the absence of any

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[1]IDEA is implemented in Indiana through 511 IAC 7-17 *et seq*. ("Article 7"). The due process hearing procedures are located at 511 IAC 7-30-3.

[2]HR 1350 at proposed Sec. 615(b)(6)(B).

[3]S. 1248 at proposed Sec. 615(f)(3)(D).

[4]S. 1248 at proposed Sec. 615(f)(3)(E)(i), (ii), (iii).

explicit statute, some States have "borrowed" and applied limitations' periods designed for other actions that are analogous to IDEA due process hearings.

The most recent reported case is Texas Education Agency *et al*. v. Texas Advocates Supporting Kids with Disabilities, 112 S.W.3rd 234 (Tex. App. 2003). In Texas Education Agency (TEA), the State sought to establish a one-year statute of limitations period during which a parent or guardian would have to request a due process hearing. The State also sought to impose a 90-day time frame within which to seek judicial review following issuance of the written decision by the hearing officer. Prior to TEA attempt to establish regulations to the effect, Texas hearing officers had applied a two-year limitations period, which they borrowed from the State's analogous period of time applied to tort claims. The same two-year period was applied to requests for judicial review although Texas does have a 30-day limitations period for judicial review in State courts of State agency decisions.[5]

The Texas Court of Appeals had no difficulty in finding TEA had the authority to create the one-year limitations period for requesting due process hearings, as due process is intimately related with the provision of a FAPE under the IDEA, State statute conferred authority upon TEA to make such rules, and the power to do so was at least an implied one (as opposed to an impermissible expedient power) in order to carry out the purposes of IDEA in Texas. The fact the TEA did not do so earlier is of no import. "The due process hearings are part of the federal program that TEA is required to implement. The fact that TEA did not initially enact a limitations period does not mean that it lacks such authority." 112 S.W.3d at 239.

However, the TEA overstepped its actual and implied authority and powers when it sought to establish a 90-day limitations period for judicial review. "The power to develop procedures for judicial review of its own decisions is not encompassed by the express requirement that TEA develop and administer a statewide design for the education of children with disabilities." Id. at 241. "[J]udicial review of TEA's decisions is an external check on the agency's authority and judgment by the courts. The power [to promulgate such a rule] was not expressly granted and cannot be implied because judicial review of

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[5]In addition to a lack of time frame for initiating a due process hearing under IDEA, the federal law does not contain a time frame for seeking judicial review either. Because of this, federal courts have borrowed "the most analogous" limitations period available in the State where the due process hearing occurred. This has lead to a myriad of decisions that bear little commonality. For example, the 5th Circuit Court of Appeals found that Texas' 30-day period for seeking judicial review in a state court was inconsistent with the underlying principles of the IDEA and, as a result, borrowed the two-year tort claims' period as "the most analogous." Scokin v. Texas, 723 F.2d 432, 435-39 (5th Cir. 1985). The 7th Circuit Court of Appeals, however, found just the opposite (with some reservation). See Powers v. Indiana Department of Education, 61 F.3d 552 (7th Cir. 1995), upholding Indiana's 30-day period for seeking judicial review of a final administrative decision. Also see Georgia State Department of Education v. Derrick C., 314 F.3d 545 (11th Cir. 2002), finding, as the 7th Circuit did, that the shorter limitations period was actually more compatible with IDEA's intents and purposes than a four-year time period determined by the federal district court.

TEA's decision is manifestly not a 'function or duty' of the agency, but a function of the state and federal courts." Id. The TEA could not, in the absence of explicit legislative provision, "unilaterally limit the only apparent external check on its due process determinations." Id.

Other State efforts to unilaterally establish limitations periods have met with mixed success. In C.M. by J.M. and E.M. v.Board of Education of Henderson County, 241 F.3d 374 (4th Cir. 2001), the 4th Circuit Court of Appeals upheld a North Carolina law that created a 60-day timeline during which a parent must request a due process hearing. Other recent cases of interest include:

1. James *et al.* v. Upper Arlington City School District, 228 F.3d 764 (6th Cir. 2000), where the 6th Circuit approved of the hearing officer's application of Ohio's two-year statute of limitations period for personal torts (rather than Ohio's four-year statute of limitations to recover personal property) to foreclose most of the reimbursement claims of the parents for a private school placement. The parents were aware of their right to request a hearing and elected not to do so.

2. Mr. and Mrs. D. v. Southington Board of Education, 119 F.Supp.2d 105 (D. Conn. 2000), where the federal district court upheld the hearing officer's decision to apply Connecticut's two-year statute of limitations to claims brought by the parents because the parents were aware of their procedural safeguards, including the right to initiate a due process hearing, but elected not to do so when the cause of action was deemed to have arisen.

3. Vandenburg v. Appleton Area School District, 252 F.Supp.2d 786 (E.D. Wisc. 2003). In this case, the federal district court upheld the hearing officer's application of Wisconsin's one-year statute of limitations to dismiss some of the parent's claims. The parent claimed that the "continuing violation" doctrine should apply, thus excusing the parent's failure to timely seek resolution of these issues. The court noted that it could not find any reported decisions where such a doctrine was applied to the IDEA.[6]

4. In Montour School District v. S.T., 805 A.2d 29 (Pa. Commw. Ct. 2002), the State court reversed the special education appeals panel, which had found that no statute of limitations period existed to be applied to defeat the parents' due process claim for compensatory education. Relying upon Bernardsville Board of Education v. J.H., 42 F.3d 149 (3rd Cir. 1994) (initiation of a due process hearing is governed by an equitable standard that requires parents to invoke their

[6]The "continuing violation" doctrine is a creature of complaint investigations. See 34 CFR §§ 300.660-300.662 and 511 IAC 7-30-2. The federal regulations for IDEA created a type of limitations period for such investigations, including a one-year period of typical violations but a three-year limitations period where reimbursement is being sought. Either limitations period could be excused where there is a "continuing violation." The complaint investigation process is not a part of the IDEA's due process procedures. The Indiana Board of Special Education Appeals (BSEA) provides greater detail in its decision discussed *infra*

administrative remedies within a reasonable time after the cause of action occurs), the State court noted that, depending upon circumstances, either a one-year or two-year statute of limitations would apply.

5. In Gregory R. *et al*. v. Penn Delco School District, 262 F.Supp.2d 488 (E.D. Pa. 2003), the federal district court applied a two-year statute of limitations period to bar claims by the parents of a middle school student.

6. In Letter to Zimberlin, 34 IDELR ¶ 150 (OSEP 2000), also discussed *infra*, the Office of Special Education Programs (OSEP), U.S. Department of Education, noted that the IDEA does not include a statute of limitations for when a due process hearing may be requested. From 1991, OSEP has indicated that although a statute of limitations period as short as one year would not be inconsistent with IDEA, it has previously indicated "that a limitation period as short as sixty days for requesting a due process hearing is inconsistent with the IDEA." [*Cf*. C.M. by J.M. and E.M. v.Board of Education of Henderson County, 241 F.3d 374 (4th Cir. 2001), *supra* finding otherwise.] OSEP did not have any problem with Connecticut's two-year statute of limitations. However, it did express concern that hearing officers may be applying the limitations period to restrict the introduction of evidence. "If the Connecticut statute was [sic] interpreted to automatically bar such evidence, we would view such an automatic evidentiary prohibition as contrary to the purposes and policies of due process proceedings under the IDEA because relevant evidence might not be appropriately considered. For example, the IDEA mandates that a child with a disability be reevaluated at least every three years. *See* 20 US.C. § 1415(a)(2). Reevaluations are often probative on the issue of a child's educational development and progress."

Restricting the Issues

Although the creation and application of a statute of limitations will foreclose some issues because these were not presented timely, absent the invocation of the doctrines of equitable tolling or equitable estoppel,[7] this will not necessarily reduce the number of issues presented at a due process hearing. Congress attempted to resolve the proliferation of issues (and the occasional "ambush") when it last reauthorized in the IDEA in 1997. Under current law, a party requesting a due process hearing has to be more specific as to the issues. 20 U.S.C. § 1415(b)(7). In addition, the parties are to share evaluative data. § 1415(f)(2). This has done little to stem the proliferation of issues that has arisen. Besides the issues that arose, typically during the meeting where the IEP is being discussed and developed, a number

[7]Both of these doctrines are addressed in passing in S. 1248. "Equitable tolling" would permit the presentation of late claims where the failure to do so timely was excusable. "Equitable estoppel" is invoked to prevent one party from benefitting from intractable behavior (such as withholding information and deliberately protracting discussions under the guise of attempting to resolve a dispute until a limitations period has run).

of allegations of procedural error unrelated to the meeting are being added. Some States have attempted to restrict the issues raised at a due process hearing, but this has met with disfavor.

In Letter to Zimberlin, 34 IDELR ¶ 150 (OSEP 2000), OSEP found a Connecticut statute restricting issues at a due process hearing to those issues raised at an IEP Team[8] meeting inconsistent with the IDEA. Although the IDEA contains some notice requirements for certain actions, such as parental notification as a condition precedent for full reimbursement for a private school placement, 20 U.S.C. § 1412(a)(10)(C)(iii), the Connecticut law "impermissibly imposes additional prior notice requirements on parties." Such an "imposition of any additional notice requirements on either party (in a manner that restricts the issues that may be heard) is inconsistent with the IDEA. Furthermore, its application would bar any review of school district actions if a district refused to conduct an [IEP Team] meeting."

In Letter to Lenz, 37 IDELR 95 (OSEP 2002), OSEP reviewed a proposed Texas rule that indicated that "no issue may be raised at a due process hearing unless it was first raised at an [IEP Team][9] meeting. Hearing officers shall dismiss any hearing request upon satisfactory proof that the issues raised in the hearing were not first presented to the [IEP Team]." OSEP found the proposed rule "impermissibly imposes additional prior notice requirements on parties. Parents and school districts do not have the right under IDEA to limit issues raised in a hearing to only the issues that were previously raised as part of an [IEP Team] meeting." Application of the proposed rule "would impose additional procedural hurdles on the right to a due process hearing that are not contemplated by the IDEA, would in many cases delay access to a due process hearing, and would bar any review of a school district's actions if a district refused to conduct an [IEP Team] meeting."

Although OSEP did not warn of this, a rule or statute that restricted issues to those raised at an IEP Team meeting would significantly alter the conduct of these meetings. At present, tape recording of such meetings is a discretionary matter. If one had to prove an issue had been raised at an IEP Team meeting, tape recording would be a minimal recourse. It is not difficult to envision the presence of court reporters and a group that OSEP actively discourages from participation in such meetings–Attorneys.[10] The stated purposes for the IEP Team would be undermined by the posturing of potential litigants.

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[8]There is no consistent terminology for the team of persons responsible for the development of a student's IEP. In Connecticut, the team is called "Planning and Placement Team." In Indiana, the team is known as the "Case Conference Committee." See 511 IAC 7-17-10. The federal law simply refers to the team as the "IEP Team."

[9]Texas refers to its IEP Team as an Admission, Review, and Dismissal Committee.

[10]See 34 CFR Part 300, Appendix A, Letter No. 29.

Indiana Applies A Limitations Period

On December 16, 2003, the Board of Special Education Appeals (BSEA)[11] considered a matter of first impression: Is Indiana's two-year statute of limitations period for tort actions "the most analogous" limitations period for application to claims under the IDEA?

The issue was raised during the due process hearing entitled In the Matter of B.B., Duneland School Corporation, and the Porter County Education Interlocal, **Article 7 Hearing No. 1335.03**. The parent attempted to request a hearing on February 8, 2003.[12] However, the issues for the hearing included issues dating to 1997. Prior to the conduct of the hearing, the school district argued that many of the parent's claims should be barred based on Indiana's two-year statute of limitations for tort actions. The hearing officer reserved ruling and took the matter under advisement. Following a five-day hearing spread over several months, the hearing officer issued his written decision on October 6, 2003.

The hearing officer ruled on the school's argument in his Conclusions of Law, finding:

1. Neither the Individuals With Disabilities Education Act (IDEA) nor Article 7 contains a specific statute of limitations for requesting a due process hearing. However, in Wilson v. Garcia, 471 U.S. 261, 105 S. Ct. 1938, 85 L.Ed 2d 254(1985), the U.S. Supreme Court provided a framework to use when deciding which statute of limitations should apply to a federal cause of action that has no express limitation period. The Court directed that first it must be determined whether one limitation period should apply to all actions under the Federal Act or whether the limitation period should vary depending on the facts of the case. Then the most appropriate [sic] statute of limitations must be determined for the federal cause of action by analyzing which state action is most analogous to the federal claim and whether the state statute of limitations governing the state action is consistent with the policies and goals of the federal act. Courts have recognized the need for the prompt resolution of educational disputes to prevent the child from falling hopelessly behind in his education.

2. The Indiana two-year limitation for personal torts appears to be applicable. IC 34-11-2-4. The Student herein is seeking recovery for an injury. A two-year time limit is

[11]See 511 IAC 7-30-4.

[12]It was unclear from the initial letter what the parent was requesting. The parent was contacted and asked what it was that she was requesting. Her clarification that she wished for a due process hearing was received on February 27, 2003. However, for the purpose of applying the two-year statute of limitations, the hearing officer used the earlier date.

appropriate and does not subordinate the goals of IDEA or Article 7 and does allow for the prompt resolution of educational disputes.

3. The applicable two years is therefore two years prior to the date the mother filed her request for the due process hearing herein (February 8, 2003) or the period commencing February 8, 2001, unless there was a continuing violation or the parents were not provided notice of their procedural rights, which would stop the running of the statute of limitations.

4. There has not been a continuing violation of IDEA or Article 7.

5. At each case conference committee meeting, the mother was provided with verbal and written notice of her rights. Although there was no notice setting forth a specific time to request a due process hearing, the notice did inform the mother that she could request a hearing. Further, all of the IEPs were agreed upon with the mother executing each but for the proposed IEP of January 29, 2003. Although not raised by the LEA, the equitable doctrine of waiver appears applicable since the mother had agreed to all of the prior IEP's. Therefore, all subsequent conclusions shall relate to and address all of the issues for the period commencing February 8, 2001.

6. The Local Educational Agency (LEA) has since February 8, 2001, provided the Student with a free appropriate public education (FAPE) in the least restrictive environment (LRE) in compliance with 511 IAC 7-17-36 and IDEA, (as it did since January, 1998).

   Under the (IDEA) and Article 7, FAPE is an educational program specifically designed to meet the unique needs of the handicapped child, supported by such services as are necessary to permit the child to benefit from the instruction. *Board of Educ. Of LaGrange School District vs. Illinois State Board of Education,* 184 F.3d 912, 915 (7th Cir. 1999). A FAPE, however, is not necessarily the best possible education or one that maximizes the potential of each child with disabilities or one that is in some sense equal to the education provided to children without disabilities. See *D.F. vs. Western School District,* 921 F. Supp. 559, 565 (S.D. Ind., 1996), *Board of Educ. Of Hendrick Hudson Cent. Sch. Dist. vs. Rowley,* 458 U.S. 176 (1982).

   See also *Heather S. vs. Wisconsin,* 125 F. 3d 1045, 1058 (7th Cir. 1997) (school district not required to provide best possible education). Review of action under

> the IDEA is limited to two inquiries: (1) whether the LEA has complied with the IDEA's administrative procedures; and (2) whether the IEP is reasonably calculated to provide educational benefits to the child. *Rowley*, 458 U.S. at 206-07; *Johnson vs. Duneland Sch. Corp.*, 92 F.3d 554, 557 (7th Cir. 1996). If these requirements are met, an LEA has complied with the IDEA's obligations. The LEA herein did so as concluded hereinafter.
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> The mother appears to argue that the LEA could not provide a FAPE because they failed to identify the Student as learning disabled or Other Health Impaired (OHI). With respect to identifying the Student as LD or OHI, the mother stated that the LEA could not address the Student's learning problems and, therefore, provide him with a FAPE, if he were not labeled LD or OHI.
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> From this Hearing Officer's review of the record, it does not appear that the mother and the LEA disagree concerning the Student's reading difficulties; rather, they essentially disagree on what such reading difficulties should be called. However, the Office of Special Education Programs ("OSEP"), which is charged with enforcing the regulations, has emphasized that there is no federal requirement to identify a child's handicapping condition with a label. *Letter to Presto,* EHLR 213:121 (OSEP 1988) ("There is no Federal requirement to identify a child's handicapping condition with a label… A determination of the child's needs can be made without agreeing upon a label for the handicapping condition."). S*ee also Heather S.*, 125 F.3d at 1055 ("The IDEA concerns itself not with labels, but with whether a student is receiving a free and appropriate education."). Accordingly, this Hearing Officer finds the mother's argument regarding the LEA's failure to identify the Student as LD or OHI in order to provide a FAPE is unpersuasive. The Student's goals and objectives were written to meet the Student's academic needs, not based on a specific label.

The parent appealed to the BSEA on November 5, 2003, raising, in part, objections to the hearing officer's application of the two-year statute of limitations to claims arising before February 8, 2001, except those claims alleging systemic or continuing violations. The BSEA conducted its review on December 16, 2003, and issued its written decision that same date.[13] At Combined Finding of Fact and Conclusion of Law No. 11, the BSEA addressed the statute of limitations issue.

> The IHO's decision to apply a two-year statute of limitations to claims prior to February 8, 2001, is a matter of first impression (Conclusions of Law Nos. 1-3 inclusive). The Parent noted in her Petition for Review that the federal regulations

[13]All BSEA decisions are published on-line at www.doe.state.in.us/legal/.

> contain a limitations period to be applied to complaint investigations. See 34 CFR § 300.662(c), establishing a one-year limitation period for the investigation of complaints "unless a longer period is reasonable because the violation is continuing, or the complainant is requesting compensatory services for a violation that occurred not more than three years prior to the date the complaint is received [by the State Educational Agency]." The federal regulations indicate that so-called "complainable" issues can be raised within a due process hearing. In fact, if the SEA has received a written request but one or more of the issues are part of a hearing, "the State must set aside any part of the complaint that is being addressed in the due process, until the conclusion of the hearing." 34 CFR § 300.661(c). The federal regulations do not indicate whether the limitations period for investigation of complaints by the SEA would apply as well to complaint issues implicated in a due process hearing. There is no question that many of the claims raised on behalf of the Student are allegations of non-compliance with federal and state regulations rather than disputes as to the appropriateness of educational services or educational placement. The IHO, to his credit, did not apply a rigid two-year limitations period based on the most analogous Indiana statute for this purpose. He recognized that there may likely be circumstances that would toll the two-year period (where "there was a continuing violation or the parents were not provided notice of their procedural rights"). Conclusion of Law No. 3. The IHO's legal analysis, including his Conclusion that application of Indiana's two-year statute of limitation found at I.C. 34-11-2-4 enhances the prompt resolution of IDEA/Art. 7 disputes regarding a child's program, is sound. The BSEA adopts his reasoning as well as his acknowledgment that there are circumstances that would toll the application of the two-year statute of limitations. The IHO permitted the introduction of the testimony that pre-dated February 8, 2001, and later determined there were no circumstances that would merit the tolling of the limitations period. This was not error.

The BSEA agreed that the hearing officer harmonized the limitations period with the dictates of the complaint investigation process when allegations of procedural non-compliance are inserted into the hearing process. In essence, a two-year statute of limitations could foreclose any issues involving the *sufficiency* of a student's IEP but not necessarily preclude allegations involving the *implementation* of the IEP. This is a version of the "continuing violation" discussed in passing in Vandenburg v. Appleton Area School District, *supra*. In addition, the BSEA agreed that the doctrines of "equitable estoppel" and "equitable tolling" would apply, but the record in this case did not support the invocation of either.

PUBLIC SCHOOLS, BRICKS AND TILES,
AND A WALL OF SEPARATION[14]
(Article By James D. Boyer[15]**)**

Public schools have increasingly been making available to the public the purchase of bricks or tiles to be displayed on school property. Sometimes this is done for fund-raising purposes; at other times, it serves a particular goal of the school. Inevitably, this opens the door for someone to use the occasion to place a religious message or viewpoint on a tile or brick. In turn, others in the community, "offended" by the religious content, complain. Fearing a First Amendment Establishment Clause violation, the schools balk and attempt to remove the purportedly offending brick or tile from public

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[14]The term "wall of separation" does not appear anywhere in the United States Constitution but was first used by Thomas Jefferson in a letter to the Danbury Baptist Association during the time of the original drafting of the Constitution. A relevant portion of the letter stated: "I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State." Extensive commentary on the meaning of this phrase first appeared in Reynolds v. U.S. 98 U.S. 145 (1878), which dealt with a member of the Mormon Church being charged with bigamy in the then-Territory of Utah. Modern references stem from Engel v. Vitale, 370 U.S. 421, 82 S. Ct. 1261 (1962), which applied the "wall of separation" rationale to the recitation of prayer in public schools.

[15]Mr. Boyer is a second-year law student at the Indiana University School of Law—Indianapolis. He served as an intern with the Legal Section, Indiana Department of Education, through the Law School's Program on Law and State Government. The photograph is by Gavin E. McDowell and courtesy of *The Megaphone*, the student newspaper at Cathedral High School (Indianapolis).

display. Meanwhile, the person whose brick or tile is removed because of the religious content sues, alleging a First Amendment violation of their right to free speech. Thus a Free Speech vs. Establishment Clause battle is joined between the parties, requiring the federal courts to officiate and determine the outcome within a First Amendment context.[16]

In the context of Free Speech Clause violations, the federal courts have applied forum analysis to determine appropriate limits on speech in the public school context. Forum analysis is used to "evaluate the nature of the [public] property and the corresponding permissible government limitations on expressive activity" occurring on the property in question. DiLoreto v. Downey Unified District Bd. of Educ., 196 F.3d 958, 964 (9th Cir. 1999). Under this approach, public property has been classified into as many as four categories: (1) public forums, traditionally identified as the public park or street; (2) designated public forums, which are nontraditional forums intentionally opened for public discourse; (3) limited public forums, which are limited to specific types of expressive activity based on subject matter and identity of the speaker; and (4) non-public forums, which are neither traditionally open forums nor designated.[17] Child Evangelism Fellowship of New Jersey, Inc v. Stafford Township School, 233 F.Supp.2d 647, 656-657 (D.N.J. 2002). As will be discussed in the cases to follow, courts most often find that the schools involved in the "bricks and tiles" controversies created limited public forums.

Once the type of forum is established, the court employs the applicable standard of analysis. In regard to traditional and designated public forums, the court applies strict scrutiny.[18] Id., citing Hague v. Comm. For Indus. Org., 307 U.S. 496, 515, 59 S. Ct. 954 (1939) and Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802, 105 S. Ct. 3439 (1985). A lesser standard of scrutiny is used with regard to limited and nonpublic forums. Although the First Amendment Free Speech

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[16]The First Amendment reads: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. Const. Amend. I.

[17]Some courts delineate three categories: public, designated, and non-public forums. See Perry Education Ass'n v. Perry Local Educator's Assoc., 460 U.S. 37, 103 S.Ct. 948 (1983). At least one court identified limited public forum as a sub-category of nonpublic forum (see DiLoreto, 196 F.3d at 965), while another viewed it as a sub-category of a designated public forum. See Anderson v. Mexico Acad. and Cent. Sch., 186 F.Supp.2d 193, 203 (N.D. N.Y. 2002), discussed *infra*. The U.S. Supreme Court established a school-sponsored forum akin to the limited public forum that allows for schools to restrict student speech if it bears the imprimatur of the school or is reasonably related to pedagogical concerns. See Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 271-73 (1988).

[18]Strict scrutiny is analysis applied to government regulation that is "necessary to serve a compelling state interest and that is narrowly tailored to achieve that end." Hague v. Comm. for Indus. Org., 307 U.S. 496, 515 (1939).

Clause requires government to allow citizens the ability to access public property for expressive purposes, including religious speech to the same degree as other types of speech, a public school may limit the type of speech allowed when opening its facilities for a limited purpose so long as the limitation is viewpoint neutral and reasonable in relation to the purposes served by the forum. Child Evangelism, 233 F.Supp.2d at 657. "[I]n a limited public forum 'the State is not required to and does not allow persons to engage in every type of speech' [and o]nly speech that the government has admitted to the limited public forum are afforded constitutional protection." Anderson v. Mexico Acad. and Cnt. Sch., 186 F.Supp.2d 193, 203 (N.D. N.Y. 2002), quoting Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 S.Ct. 2093, 2100 (2001). Therefore, a public school, unlike the government in regard to public parks and streets, may limit expressive activity within the narrow confines of its purpose so long as such restrictions are reasonable in light of that purpose and do not exclude speech simply due to the viewpoint espoused.

Establishment Clause violations are analyzed by applying a three-prong test first enunciated in Lemon v. Kurtzman, 403 U.S. 602, 91 S. Ct. 2105 (1971). In order to withstand an Establishment Clause challenge, the restrictive policy "must (1) have a secular legislative purpose; (2) have the principle or primary effect of neither advancing nor inhibiting religion; and (3) not foster excessive governmental entanglements with religion." Demmon v. Loudoun County Pub. Sch., 279 F.Supp.2d 689, 697 (E.D.Va. 2003), citing Lemon, 403 U.S. at 612-13. Subsequent refinements have been undertaken by the Supreme Court to address inadequacies in the Lemon analysis and to clarify how the test is to be applied—the "Endorsement Test" proposed by Justice Sandra Day O'Connor in her concurring opinion in Lynch v. Donnelly, 465 U.S. 668, 104 S. Ct. 1355 (1984) and the "Coercion Test" applied by Justice Anthony M. Kennedy in Lee v. Weisman, 505 U.S. 577, 112 S. Ct. 2649 (1992).[19] Justice O'Connor's endorsement test merges the first two prongs of Lemon (the purpose and effects prongs) to explore whether the purpose of the government's action is to endorse or disapprove of religion and whether the actual effect of that purpose sends a message of endorsement or disapproval.[20] Justice Kennedy's coercion test seeks to protect students from being coerced to participate in religious exercises that may be sponsored by the school. He asserts, "[t]he Constitution guarantees that government may not coerce anyone to support or participate in religion or its exercise, or otherwise act in a way which establishes a state religion or religious faith, or tends to do so."[21]

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[19]Rebecca A. Valk, Good News Club v. Milford Central School: A Critical Analysis of the Establishment Clause as Applied to Public Education, 17 St. John's J.L. Comm. 347, 362-64 (Winter/Spring, 2003).

[20]Id. at 362-63.

[21]Id, at 364, quoting Lee, 505 U.S. at 587 (internal quotes omitted).

Recent "Bricks and Tiles" Cases

Three recent cases deal specifically with "bricks and tiles" as a forum for speech in public secondary schools.

1. In Demmon v. Loudoun County Pub. Sch., 279 F.Supp.2d 689 (E.D.Va. 2003), a parent group, "Parents Associated With the School" (PAWS), started a fund-raising activity in which PAWS sold engraved paving bricks to parents or relatives of students. These bricks would then be used to create a "walkway of fame" covering a sidewalk area in front of the high school (School) between two flagpoles. Inscriptions of personal messages or symbols could be placed on the bricks. No guidelines were established as to the nature of the messages but twenty-four (24) symbols were allowed, including those with school-sponsored extracurricular themes such as soccer, volleyball, music, and drama, but only one religious symbol, the Latin Cross.[22] Students could walk over the bricks on the way into the school but could also easily avoid the walkway. After the bricks were in place, the principal of the school informed those parents and students who had included the Latin Cross that their bricks had been removed due to feared legal difficulties in allowing the religious symbol to appear on a brick on school property. They were advised that their bricks could be replaced with substituted bricks without the religious symbol and they could be refunded the cost of the inscription of the religious symbol ($5.00). Parents of five students (Parents) sued alleging, *inter alia*, that removal of the bricks with the Latin Cross and disallowing the symbol altogether was a violation of their rights under the Free Speech and Establishment Clauses of the United States Constitution as well as the Virginia Constitution.[23] They sought declaratory relief and a return of the bricks with the Latin cross to the "walkway of fame." The School filed a motion to dismiss for failure to state a claim upon which relief could be granted pursuant to Federal Rules of Civil Procedure 12(b)(6). The dismissal motion was the issue the court considered.

   In determining the free speech claim, the court concluded, first, that the "walkway of fame" amounted to a limited public forum. Id. at 694. Upon the evidence, the court found the School intended to open the walkway to a limited extent. The brochure advertising the program indicated that families of students could use inscriptions to honor students, school personnel, and both current and former school community members.

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[22] The Latin Cross has a base stem longer than the three arms of the cross. It is a Christian symbol. See Harris v. City of Zion, 927 F.2d 1401 (7th Cir. 1991).

[23] The court found both the United States Constitution and the Virginia Constitution to be co-extensive and, therefore, considered each claim simultaneously governed by the same law.

Next, the court considered whether removing the Latin cross as an initially permissible symbol was reasonable in light of the purpose of the forum and was viewpoint neutral. The court held that the Parents alleged sufficient facts to support their claim that the Latin Cross "has been impermissibly excluded solely on the basis of its religious message." Id. at 696. The court refused to decide the issue whether the exclusion was reasonably related to the purpose of the forum because it found viewpoint discrimination. Despite the School's argument that its purpose was "to showcase the school-sponsored activities with which the honoree was affiliated, [and] not provide a forum for discussion or endorsement of certain religions," the court sided with the Parents that the purpose of the symbols was to allow the inscribers to create memorials of important activities or interests to the honorees. Id. This conclusion was supported by the inclusion of two other symbols besides the symbols depicting school-sponsored activities and the Latin cross: "the tree (possibly symbolizing an interest in environmentalism or farming) and the horseshoe (likely symbolizing equestrian activities)." Id. at 695-96. The court quoted the Supreme Court in Good News Club, 533 U.S. at 112, in holding that "speech discussing otherwise permissible subjects cannot be excluded from a limited public forum on the ground that the subject is discussed from a religious viewpoint." Id. at 696.

In addition, the court held that the Parents alleged sufficient facts to support a claim of an Establishment Clause violation that inhibited religion to the degree that the second prong of the Lemon test could not be met. The Parents claimed the School's actions sent a message of exclusion and disfavor, exhibited hostility to religion, and excessively entangled the School with religion by creating an approval process that hinges on the degree of religious speech a proposed symbol expresses. Id. at 696-97. The court observed:

> If the purpose of the walkway is to commemorate honorees in their involvement in school-sponsored activities, the limit on symbols may be appropriate. If, however, the purpose of the walkway is not so narrowly construed, exclusion of any religious symbol may have the impermissible effect of inhibiting religion. The Establishment Clause is not violated by allowing religious groups access to school property on the same terms as non-religious groups.

Id. at 697. In light of this reasoning, the court concluded that the School's argument that it was required to prohibit religious symbols in order to avoid violating the Establishment Clause was not compelling. Id.

2. In Anderson v. Mexico Academy and Central School, 186 F.Supp.2d 193 (N.D. N.Y 2002), the student class of 1999, along with the superintendent and school board (collectively, the "School"), initiated a plan to sell bricks to the community in order to raise money for the class of 1999's senior trip. The bricks cost between $25 and $30. The bricks were to be placed in a walkway to be built in front of the school. Purchasers of bricks were allowed to inscribe up

to three lines of their choice. Obscene or vulgar messages were not permitted. They were allowed to place their bricks anywhere in the walkway. Two of the plaintiffs inscribed messages with references to "Jesus"[24] while another purchaser, who was not a party to the suit, inscribed the message, "God Bless You/Father Wirkes/St. Mary's Church." After the walkway was constructed and the bricks placed, some members of the community complained about the specific references to a Christian God and even phoned the offices of United States Senator Charles Schumer (D.-N.Y.). In an effort to address the concerns, the School inserted a disclaimer into the walkway stating, "The messages on this walkway are personal expressions and contributions of the individuals of Mexico Academy and Central School community." Nevertheless, the disclaimer failed to satisfy the complainants. The School sought a legal opinion on the matter and was advised that, although the law was unsettled, references to a specific God may be in violation of New York Education Law and the United States Constitution. Subsequently, the School removed only the bricks with references to "Jesus" but retained the "God Bless You/Father Wirkes/St. Mary's Church" brick, believing universal references to God were permissible. Also, the School adopted a policy forbidding all religious and political messages. The School refused a brick with the message, "Keep Abortion Legal."

Plaintiffs moved for a preliminary injunction, requesting that the bricks be placed back into the walkway. Two of their allegations asserted Free Speech and Establishment Clause violations. The district court held against the plaintiffs in their motion due to insufficient evidence to sustain the relief sought on all the required elements.[25] Id. at 195. However, with specific regard to the plaintiffs' Free Speech claim, "it appears that plaintiffs demonstrated a clear or substantial likelihood of success on the issue of viewpoint discrimination." Id. at 205.

In arriving at this conclusion, the court did not find it necessary to resolve the dispute over whether the forum that existed was designated or limited because some of the plaintiffs' evidence indicated the School was not viewpoint neutral when it allowed speech by others essentially of the same nature such as the "God Bless You/Father Wirkes/St. Mary's Church" reference. The School attempted to argue that the purpose of the walkway was limited to inscriptions that commemorated the school and that, even if it were originally open to any expressions so long as they were not vulgar or obscene, the School's new policy prohibited religious and political expressions. The court rejected this argument:

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[24] The inscriptions were "Jesus Saves" and "Jesus Christ is the Lord of this School."

[25]The elements required for the granting of a preliminary injunction are: "(1) [the movant] will suffer irreparable harm; and (2) either (a) [there exists] a likelihood of success on the merits; or (b) a sufficiently serious question that raises a fair ground for litigation with the balance of hardships tipping decidedly in [movant's] favor, . . ." Id. at 201.

> In this case, even if the walkway was [sic] limited to use for commemorative purposes and excludes religious speech, as defendants contend, because at least one brick evincing a religious message, "God Bless You/Fr. Wirkes/St. Mary's Church," was permitted, such use indicates that the forum may be characterized as having been designated for the limited category of deism, or inscriptions which refer to God. Thus, plaintiffs have presented evidence which indicates that Mexico Academy excluded their bricks, which refer to "Jesus," on the basis that it is a reference to a specific deity, an otherwise permissible category.

Id. In regard to the Establishment Clause claim, the district court held that the plaintiffs failed to submit evidence sufficient to demonstrate success on this issue. Id. at 208. Even though the plaintiffs asserted the School demonstrated hostility toward religion in the removal of their bricks that referred to "Jesus," the court distinguished this case from two cases the plaintiffs cited in their argument: Good News Club v. Milford Cent. Sch., 533 U.S. 98, 121 S. Ct. 2093 (2001) (holding that a school had no Establishment Clause concern justifying the denial of allowing a religious club from using school facilities to conduct religious activities because other clubs were able to use the same facilities, the activity was to occur after school hours, and children must have parental approval in order to attend) and Lamb's Chapel v. Center Moriches Union Free Sch. Dist., 508 U.S. 384, 113 S.Ct. 2141 (1992) (finding that a school permitting a church to use its facilities to show a film containing religious content would not violate the Establishment Clause because the showing of the film would occur after school hours, would be open to the public, and the school facilities were used by a variety of private organizations). The court reasoned "[h]ere, the evidence indicates that plaintiffs' bricks, unlike the religious groups in Lamb's Chapel and Good News Club, if permitted on school property, would be present before, during and after school hours, and would allegedly be visible to all who cross the walkway." Id. at 208.[26]

3. On April 20, 1999, two students, Eric Harris and Dylan Klebold, entered Columbine High School (School) in Colorado armed with weapons and shot several students and teachers before committing suicide. In an effort to reopen the school the following school year, school officials decided on a plan to change the appearance of the school building in order to address the unpleasant memories associated with that tragic day. In Fleming v. Jefferson County Sch. Dist. R-1, 298 F.3d 918 (10th Cir. 2002), the School proposed a project where students and individuals in the community would create tile art that would be placed in the halls of the

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[26] Fr. Stephen Wirkes, the pastor of St. Mary Star of the Sea Catholic Church, who was mentioned on one of the bricks, *supra*, told *The Syracuse (NY) Herald American* that he felt the "bricks should not have gone in, in the first place." He added, "They were meant to be provocative. They were meant to be confrontational. And they were meant to tear this community apart. And they did." *Education Daily*, p. 3 (June 12, 2000).

school. The project would serve two purposes: (1) to reacquaint and assist students in becoming comfortable with the school; and (2) to allow them, as well as persons from the community, to participate creatively in the school's reconstruction. In order to keep the tile project from becoming a memorial to the tragedy, the School placed limitations on the project that barred references to the attack, names or initials of students, ribbons, obscene or offensive messages and symbols, and religious references. Tiles were screened to determine compliance with the guidelines but, due to the sheer number submitted, some tiles were displayed that contravened the policy. These tiles contained, *inter alia*, crosses, gang graffiti, a Jewish Star of David, an anarchy symbol, a skull dripping with blood, angels, and the date of the attack. Later, the School relaxed its policy to allow tiles containing children's names or initials, dates other than April 20 (the anniversary of the shooting), and the Columbine ribbon. However, the School still prohibited the use of religious messages or any obscene or offensive content. The Plaintiffs in the case indicated that they did not wish to repaint their tiles but wanted to submit the ones they had already painted. Subsequently, they sued, alleging violation of their right to Free Speech and violation of the Establishment Clause. The federal district court found in favor of the Plaintiffs on their free speech claim and the School appealed. The Tenth Circuit reversed, applying the definition of "school-sponsored" speech in Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S. Ct. 562 (1988) (holding that a school could limit student speech appearing in a school newspaper because the speech both bore the imprimatur of the school and was reasonably related to legitimate pedagogical interests of the school). The Tenth Circuit held that the tile project was "school-sponsored speech" and, therefore, merited a different analysis that did not require the School to be viewpoint neutral in determining whether the limitations enacted by the school were constitutionally permissible. Id. at 923. However, the court acknowledged that the Circuit Courts are split over whether school-sponsored speech must be viewpoint neutral.[27] Id. at 926.

The court differentiated among three types of school speech, finding in between "pure student expression" and "government speech" a "school-sponsored speech," which constitutes "expressive activities that students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school . . . [and are] related to legitimate pedagogical concerns." Id. at 923, 924 (quoting Hazelwood, 484 U.S. at 271, 273). The court found that if the speech "bears the imprimatur of the school and involves pedagogical interests . . . the school may impose restrictions on it so long as those restrictions are reasonably related to

[27] The First Circuit, Ward v. Hickey, 996 F.2d 448 (1st Cir. 1993), and the Third Circuit, C.H. ex rel Z.H v. Olivia, 197 F.3d 63 (3d Cir. 1999) (en banc), agree with the Tenth Circuit, while the Sixth, Kincaid v. Gibson, 191 F.3d 719 (6th Cir. 1999), Ninth, Planned Parenthood of S. Nev., Inc. v. Clark County Sch. Dist., 941 F.2d 817 (9th Cir. 1991), and Eleventh Circuits, Searcy v. Harris, 888 F.2d 1314 (11th Cir. 1989), hold that the restriction on the speech must be viewpoint neutral.

legitimate pedagogical concerns." Id. at 924. The court reasoned that since the tiles will become a permanent part of the school building, coupled with the fact that the School organized and facilitated the activity, then it conveys a message of the School's approval. Id. at 930. In addition, the court reasoned that the learning environment, including the school hallways, constitutes a pedagogical concern, which can affect the learning process. Id. at 931. In this case, allowing religious messages would defeat two of the School's pedagogical concerns: (1) ensuring a positive learning environment without reference to the tragedy; and (2) avoiding the disruption of religious debate on the school's walls. Id. at 932. "[I]f the school allowed some religious symbols to be posted, it would open the door to all types of sentiments, including inflammatory ones, such as Nazi symbols. . . . When posed with such a choice, schools may very well elect to not sponsor speech at all, thereby, limiting speech instead of increasing it." Id. at 932,934.[28] The court further explained:

> In this case, however, the District asserted two pedagogical reasons for its restriction on religious references: (1) religious references may serve as a reminder of the shooting, and (2) to prevent the walls from becoming a situs for religious debate, which would be disruptive to the learning environment.

Id. at 934.

The Tenth Circuit in Fleming felt compelled to justify its holding without references to viewpoint discrimination. However, as was seen in DiLoreto, *supra*, which the court in Fleming cited to in its opinion, it is possible to reach the conclusion in Fleming without dismissing viewpoint neutrality from the analysis. In DiLoreto, a businessman sued the school district because the district refused to post his Ten Commandments "advertisement" on the high school baseball fence along with other advertisements the booster club used in order to raise money. Like Fleming, the court held that the school district could exclude religious content from the fence if the message could be deemed disruptive of the educational purpose of the school. DiLoreto, 196 F.3d at 962. However, unlike Fleming, the court established its holding by finding that neither the school's refusal in posting the advertisement nor its decision to close the forum to all advertising amounted to viewpoint discrimination when it noted that "[n]othing in the record, . . . indicates that the District opened the forum to the subject of religion." Id. at 962, 969.[29]

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[28] The reference to the Nazi swastika and other Nazi symbols is significant. The date selected by Harris and Klebold—April 20—is also Adolph Hitler's birthday.

[29]For a more expansive treatment of DiLoreto and similar cases, see "Commercial Free Speech, Public Schools, and Advertising," **Quarterly Report** October-December: 1999 (article by Valerie Hall, Legal Counsel).

It is also important to note that Hazelwood can be distinguished from Fleming in that the speech at issue in Hazelwood involved pure student speech while in Fleming the school opened the tile project to both students and members of the community. The Tenth Circuit in Fleming reversed the decision of the district court that initially held the school's guidelines violated the plaintiffs' right to free speech. 298 F.3d at 920. The Tenth Circuit determined that the district court read the holding of Hazelwood too narrowly, applying it to activities that are considered a part of the school curriculum. Id. at 924. Rather, the Tenth Circuit embraced a more expansive reading of Hazelwood, defining school-sponsored speech as any activity that "might reasonably bear the imprimatur of the school and that involve pedagogical concerns." Id.

The above cases offer little in resolving the myriad of First Amendment issues faced by schools when adopting fundraising schemes or community-building activities utilizing bricks and tiles. Schools continue to navigate between fine legal distinctions on the matter and a need to raise funds for local purposes. Fear of potential litigation may be a factor for schools in limiting future decisions on whether to open fundraising or other school forums via bricks and tiles.

ATTORNEY FEES AND THE IDEA: DEMISE OF THE "CATALYST THEORY"

The IDEA did not originally provide for attorney fees as a part of the costs to be awarded to the parents of a student with a disability who prevail in an action or proceeding under the IDEA. Congress passed the Handicapped Children's Protection Act of 1986 (P.L. 99-372) specifically to authorize an award of attorney's fees to prevailing parents.[30] The current provisions can be found at 20 U.S.C. § 1415(i).

Since 1986, a considerable amount of litigation and court decisions have wrestled with when–or even whether–is a party "prevailing" for the purpose of IDEA. One analysis that has arisen over time and been applied in many contexts is the so-called "catalyst theory." Under this theory, a plaintiff who achieved his desired result (as indicated in the plaintiff's lawsuit) through a voluntary change in the defendant's conduct prior to a judicial resolution could recover attorney fees as the "prevailing party." This usually involved a private settlement between the parents and the school district, followed by a voluntary dismissal but without the terms of the settlement incorporated into any final order of the court.

Although Congress has passed over 70 laws since the Reconstruction period that contain "prevailing party" fee-shifting language, the U.S Supreme Court never addressed directly whether a "catalyst

[30]Congress was reacting to the decision of the U.S. Supreme Court in Smith v. Robinson, 468 U.S. 992, 104 S. Ct. 3257 (1984), where plaintiffs who prevailed in IDEA proceedings (then the Education of the Handicapped Act) were not entitled to attorney fees because Congress did not specifically include such a provision in the law.

theory" is inherent in such fee-shifting provisions. It did seem to endorse the concept in *dicta.* Prior to May 29, 2001, every Circuit Court of Appeals except the 4th Circuit and 5th Circuit had adopted and applied a "catalyst theory."

Then the U.S. Supreme Court (5-4) decided Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Services *et al.*, 532 U.S. 598, 121 S. Ct. 1835 (2001). Buckhannon did not involve the fee-shifting provisions of the IDEA, 20 U.S.C. § 1415(i)(3), but it did involve similar federal laws that had virtually identical fee-shifting provisions, notably the Americans with Disabilities Act of 1990.[31]

In Buckhannon, the Supreme Court adopted a standard definition for "prevailing party" as "a party in whose favor a judgment is rendered regardless of the amount of damages awarded." 121 S. Ct. at 1840. In order to be a "prevailing party," the Court added, one would have to have either a judgment on the merits or a settlement agreement that is enforceable through a consent decree, or some other court-ordered change in the legal relationship between the parties. Id. The "catalyst theory" permitted the plaintiff to recover attorney fees so long as the complaint had sufficient merit to withstand a motion to dismiss.

> A defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change. Our precedents thus counsel against holding that the term "prevailing party" authorizes an award of attorneys fees without a corresponding alteration in the legal relationship of the parties.

Id. (emphasis original). The Court added that private settlements "do not entail the judicial approval and oversight involved in consent decrees. And federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal." Id. at *n.* 7.

Although, as noted, Buckhannon did not involve the IDEA directly, it did address Congressional fee-shifting language that appears in other federal laws. The similarity of the language militates in favor of application of Buckhannon to IDEA disputes. The 4th Circuit applied Buckhannon to all "prevailing party" fee-shifting statutes. See Smyth v. Riveror, 282 F.3d 268, 274 (4th Cir. 2002). However, the 2nd Circuit and the 3rd Circuit have applied Buckhannon directly to IDEA. See J.C. v. Regional School District No. 10, 278 F.3d 119, 124 (2nd Cir. 2002) and John T. v. Delaware County Intermediate Unit, 318 F.3d 345 (3rd Cir. 2003).

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[31]The only notable difference is that IDEA provides for attorney fees for a "prevailing parent" rather than a "prevailing party."

On November 14, 2003, the 7th Circuit Court of Appeals, which includes Indiana, joined the 2nd , 3rd, and 4th Circuits. In T.D. v. LaGrange School District No. 102, 349 F.3d 469 (7th Cir. 2003), the school district's procedural lapses–notably in its "child find" responsibilities–resulted in an adverse administrative hearing decision. The parents and the school had had previous disagreements regarding one of the parents' other children. The parents' child in this case, T.D., was dismissed from a private school because it could not meet his needs. The parents had him privately evaluated. The private evaluator recommended T.D. attend a school with low teacher-student ratio, preferably a private, therapeutic day school. During the second semester, T.D.'s mother had several discussions with special education personnel from the local public school district. The mother visited the public school where T.D. was likely to attend. While there, she spoke with building personnel regarding the school's programs, especially its special education services. "At no point...did the school district request written consent to conduct a case-study evaluation of T.D. to determine his potential eligibility for various special-education programs." 349 F.3d at 472.

The following school year, T.D. was enrolled in a private therapeutic day school, contingent upon the parents obtaining a one-to-one aide. The parents requested a due process hearing against the public school, alleging the school district, *inter alia*, failed to evaluate T.D. despite actual notice that he may require special education services; failed to advise the parents of their rights; failed to consider the results of the independent evaluation; and failed to advise the parents of placement options. Id. In essence, the parents alleged the school district denied T.D. a FAPE and sought, in part, an evaluation, a determination of eligibility, reimbursement for costs expended on the private placement (including the independent evaluation), and a one-to-one aide to assist T.D. at the private school. Id.

The hearing officer issued an interim order, requiring the school to evaluate T.D. After this occurred, T.D. was determined eligible for services under the IDEA. The hearing officer also determined the school district was aware in early Spring that the student might require special education services and should have obtained the parent's consent to evaluation at that time. The school district's procedural lapses "contributed to the parents' need to place T.D. in the private school and to obtain a one-on-one aide." Id. at 473. The hearing officer ordered reimbursement for the costs of the aide and transportation. He denied reimbursement for the private school tuition because the private school "could not adequately meet his needs." Id. He ordered T.D. transferred to the educational placement offered by the public school district but rejected by the parents.

The parents sought judicial review as well as attorney fees and costs. Before the federal district court could rule on the merits, the parties settled their differences except as to attorney fees, leaving this issue for the district court to decide. The district court found T.D. was a "prevailing party" and was entitled to attorney fees under IDEA's fee-shifting provision. The district court found that Buckhannon did not apply and awarded T.D. nearly $120,000 in attorney fees. Id. at 474.

The 7th Circuit reversed, finding that Buckhannon does apply but that the parents, as prevailing party at the administrative hearing, were entitled to some attorney fees. In so holding, the 7th Circuit

observed the settlement between the parties did not provide a judgment on the merits, a consent decree enforceable by the court, or anything that could be construed as having the "judicial *imprimatur*" of the court. "[T]here is little doubt that the *Buckhannon* Court intended its interpretation of the term 'prevailing party' to have broad effect upon similar fee-shifting statutes." Id.

The 7th Circuit was not willing to apply Buckhannon as expansively as the 4th Circuit has in Smyth, *supra*, where the 4th Circuit indicated it would consistently apply Buckhannon to all fee-shifting statutes "without distinctions based on the particular statutory context in which it appears." Smyth, 282 F.3d at 274.

> While there is some appeal to the simplicity of this position, this Court has not yet gone that far. Rather, we have left open the possibility that if the "text, structure, or legislative history" of a particular fee-shifting statute indicate that the term "prevailing party" in that statute is not meant to have its usual meaning–as defined in *Buckhannon*–that *Buckhannon*'s strictures may not apply.

349 F.3d at 475. For this analysis to apply and thus negate an application of Buckhannon, however, the "text, structure, or legislative history" would have "to clearly indicate that in the IDEA, Congress did not intend to use the term 'prevailing party' in its traditional 'term of art' sense." Id.

Although IDEA's fee-shifting provisions do contain some limiting language, these provisions "do not clearly indicate that the term 'prevailing party' was intended to encompass anything more in the IDEA than in any of the other 'prevailing party' fee-shifting statutes." Id. at 476. The 7th Circuit noted that the application of Buckhannon to IDEA has become a majority position among the federal courts that have squarely addressed the issue. Id. at 478. The court also acknowledged the public policy concerns raised by applying Buckhannon, but these public policy matters were also addressed in the Supreme Court's original decision as well as in the concurring opinion by Justice Antonin Scalia. In Buckhannon, petitioners argued that a rejection of the "catalyst theory" would create a disincentive for plaintiffs to settle cases and an incentive for defendants to engage in procedural chicanery. The "petitioners' fear of mischievous defendants" would only be present in a claim for equitable relief. A defendant's voluntary cessation of a challenged activity will not deprive a federal court of its power to determine the legality of the practice unless it is absolutely clear to the court the challenged activity will not recur. 121 S. Ct. at 1842-43.[32]

The 7th Circuit recognized "the importance and benefit of quick resolution to any litigation, particularly litigation that involves the educational placement of a child." 349 F.3d at 477. However, the same argument was present in Buckhannon–the quick resolution of a disabled person's claims under the

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[32]Parties to a suit do not have a right to claim a dispute is moot. The Supreme Court has long held that "voluntary cessation of allegedly illegal conduct...does not make the case moot." United States v. W.T. Grant Co., 345 U.S. 629, 632, 73 S. Ct. 894 (1953).

ADA–but the Supreme Court was not convinced that a rejection of the "catalyst theory" would result in plaintiffs avoiding settlements of disputes. "In other words, *Buckhannon* simply has closed the door on this argument." Id. at 477. The court noted that an applicability of the "catalyst theory" for settlements without the "judicial *imprimatur*" could also result in more attorney involvement at the IEP Team level, where IDEA specifically does not contemplate either the involvement of attorneys or the awarding of attorney fees.

> The settlement agreement in this case does not bear any of the marks of a consent decree. It is not embodied in a court order or judgment, it does not bear the district court judge's signature, and the district court has no continuing jurisdiction to enforce the agreement. Rather, it was merely a private settlement agreement between the parties.

Id. at 479. There was no "official judicial approval of the settlement and some level of continuing judicial oversight." Id. T.D. argued that even should it be determined the settlement agreement foreclosed some attorney fees, he still prevailed at the due process hearing. The 7th Circuit agreed, noting that prior to the hearing, the school district did not acknowledge his right to IDEA benefits and that, through the administrative process, he substantially prevailed. He was entitled to attorney fees for prevailing at the administrative hearing. Id. at 480.

However, T.D. was not entitled to the costs of his expert witnesses. IDEA's fee-shifting provisions do not address the costs of expert witnesses. Id. at 481. Following the 8th Circuit's lead in Neosho R-V School District v. Clark, 315 F.3d 1022, 1031 (8th Cir. 2003), the 7th Circuit determined that, in the absence of "a specific authorization for the allowance of expert witness fees," the federal courts will be bound by the fee limitations set out in 28 U.S.C. § 1821 and § 1920 ($40 a day for each day in attendance). Id. at 481-82.

COURT JESTER: SUBORDINATE CLAUS

Yes, Virginia, there is a Santa Claus.[33]

We should know. The State of Ohio prosecuted him.

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[33]This statement was made by Francis P. Church (1839-1906) in an 1897 editorial "Is There a Santa Claus?" in the *New York Sun*, responding to eight-year-old Virginia O'Hanlon who wrote to the paper to ask this question after her friends told her there was no Santa Claus. "Papa says, 'If you see it in *The Sun*, it's so.' Please tell me the truth: Is there a Santa Claus?"

In The State of Ohio v. Santa Claus, 774 N.E.2d 807 (Ohio. Mun. 2002), Warren J. Hayes, a.k.a. Santa Claus, was involved in a minor traffic accident. Santa[34] "paid cash money on the spot to the individual whose car he had hit." Id. at 808. However, when the constable requested his driver's license, Santa provided him his Ohio Identification Card.[35] A person is not permitted to have both an Identification Card and a driver's license. Santa's alter ego–Warren J. Hayes–does have a driver's license. However, "Santa is not an Ohio licensed driver who does have an Ohio Identification Card." Ohio charged Santa with displaying a "fictitious" identification card, a first-degree misdemeanor.

Now is the critical question, the same as previously resolved in the much publicized but unreported case out of New York case chronicled in Valentine Davies' 1947 novel *Miracle on 34th Street*[36]: Is there a Santa Claus or is he "fictitious," as Ohio charged?

Judge Thomas P. Gysegem decided to hedge his bets and opt for the existence of the Merry Ol' Elf. A hearing was held during which Santa produced eight (8) exhibits, which the court found "quite relevant to the issues at hand." These exhibits included, *inter alia*, a copy of a "Certificate of Birth" for one Santa Claus born at the North Pole on December 25, 383 A.D. to a Mr. Claus and Holly Noel, with Dr. Snowflake in attendance; copies of Ohio Identification Cards with photos of Santa for 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1996 and 1997 that were issued to Santa Claus by the State of Ohio, indicating a residence at 1 Noel Drive, North Pole, OH, 44481[37], as well as a copy of AAA Temporary Membership Card for 1995; a certificate of title issued to Santa on December 17, 1987, as well as the actual vehicle registration issued to Santa by the State

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[34]The court insisted on referring to Hayes as "Santa Claus" and even included a little ditty to reinforce the court's perception of the seriousness of the matter (774 N.E.2d 807, *n.* 1):

Jolly old Saint Nicholas, lean your ear this way!
You tell every single soul what I'm going to say;
Trial day is coming soon; Now you dear old man,
Concerning BMV and you–I'll tell you best I can!

[35]Ohio, like all States, provides identification cards for those who cannot obtain a driver's license.

[36]Most people do not recall the novel but the movie that came out the same year under the same title, starring Maureen O'Hara, Natalie Wood, William Crowley ("Fred Mertz" from "I Love Lucy"), and Edmund Gwenn (who won an Oscar as Best Supporting Actor for his portrayal of Kris Kringle). Davies also won an Oscar for Original Story, while George Seaton won an Oscar for Best Screenplay. The movie was also nominated for Best Picture. A forgettable remake occurred in 1994. Davies was also responsible for four other endearing movies: "It Happens Every Spring," "Bridges at Toko-Ri," "The Glenn Miller Story," and "The Benny Goodman Story" (which he also directed).

[37]The address is provided just in case a reader feels a need to contact Kris Kringle with any specific requests.

of Ohio for a 1965 Volkswagen two-door sedan; a copy of a blank check on the account of Santa Claus and Mrs. Santa Claus with the Second National Bank of Warren. 774 N.E.2d at 808-09.

The court noted that a person in Ohio may change his name either by petitioning the probate court "or by the simple expedient of adopting and using a new one. Both procedures are equally valid in the eyes of the law... so long as he does not do so for a fraudulent purpose." Id. at 809.

"There can be no doubt based on the aforesaid exhibits," the court wrote at 809, "that Santa and the Bureau of Motor Vehicles have had a solid and ongoing relationship for 20 years." The judge noted that "there is no evidence that Santa adopted his name for the purpose of avoiding any just debt or the payment of taxes. To the contrary, Santa routinely paid (and the state of Ohio accepted) taxes and registration fees under the name of Santa for many years." Id.

The judge was not entirely unsympathetic to the BMV or law enforcement. "Without such strict efforts on BMV's part, it would be much easier for would-be terrorists or criminals to obtain much sought-after *fraudulent* identification that could more easily enable them to act out ghastly plans of skullduggery." Id. at 809-10 (emphasis original). But the key legal question is: Did Santa violate the law, to wit: "Was this identification card 'fictitious'?" Id. at 810. The judge consulted a dictionary for a definition of "fictitious," settling upon synonym comparisons with "fabulous," "legendary," "mythical," and "apocryphal."

> *Fabulous* stresses the marvelous or incredible character of something without distinctly implying impossibility or actual nonexistence; *Legendary* suggests the elaboration of invented details and distortion of historical facts produced by popular tradition; *Mythical* implies a purely fanciful explanation of facts or the creation of beings and events out of the imagination; *Apocryphal* implies an unknown or dubious source or origin for an account circulated as true or genuine. * * * *Fictitious implies fabrication and suggests artificiality or contrivance more than deliberate falsification or deception*.

Id. (emphasis original). "Had Santa been charged with being 'fabulous, legendary, mythical or apocryphal,' he might well indeed be guilty, facing up to 180 days in jail and a $1,000 fine." Id. However, Ohio charged Santa with displaying a "fictitious" identification card. The State failed to prove its case.

> The fact that Santa had an ongoing relationship for 20 years with the BMV is not indicative of "artificiality or contrivance," for, in fact, under the publicly held records of the Ohio Bureau of Motor Vehicles, Santa has been a "real person" since as early as 1982.

Id. Judge Gysegem did note that "[f]ortunately, this court is not called upon to reach an ultimate determination of the issue as to the actual determination of the issue as to the actual existence of Santa Claus." Id. at *n.* 3. However, in this case, he found that "Santa has been a registered name with the BMV since 1982. This court finds that Santa's act of displaying his Ohio Identification Card to the officer can in no way be construed to be a violation..." of Ohio law. The case was dismissed.[38] The court included a copy of Santa's Identification Card and his address as an Appendix to the opinion.

The State of Ohio elected not to appeal.

QUOTABLE . . .

> [N]o matter how well intentioned the stated objective, once schools get into the business of actively promoting one political or religious viewpoint over another, there is no end to the mischief that can be done in the name of good intentions.

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[38]The court added at *n.* 4 so as not to get coal in his stocking:

He sees you when you're sleeping
He knows when you're awake
He knows if you've been bad or good
So be good for goodness sake!

Federal District Court Judge Gerald E. Rosen in Hansen *et al.* v. Ann Arbor Public Schools *et al.*, 293 F.Supp.2d 780, 803 (E.D. Mich. 2003), finding that the school district violated a student's free speech and equal protection rights when it actively prevented her from expressing an opposing view to a panel on Homosexuality and Religion sponsored by the school during a Diversity Week observance.

UPDATES

Peer Sexual Orientation Harassment

In **Quarterly Report** January-March: 2003, several cases were reported regarding the growing body of litigation addressing discrimination or harassment based upon the perceived sexual orientation of a student. One of the cases reported was Flores *et al.* v. Morgan Hill Unified School District, 324 F.3d 1130 (9th Cir. 2003), where student-to-student sexual harassment based on perceived or actual sexual orientation was not addressed adequately or at all by school personnel when students complained of the persistent name-calling, physical abuse, vandalism to school lockers and other denigrating activities. The court refused to dismiss the suit, finding the school's reactions to the complaints of the six affected students could amount to "deliberate indifference," which, in turn, would constitute liability. On January 6, 2003, the school district settled the dispute for a reported $1.1 million. As a part of the settlement, the school district did not admit liability but did agree to conduct training sessions for students and teachers to discourage anti-gay harassment.

Team Monikers and Mascots: What's in a Name?[39]

The controversy continues over the use of Native American nicknames and mascots by professional sports teams and publicly funded schools.[40] For a number of years, Native American groups have attempted to halt the use of Native American imagery in what they perceive as a demeaning manner. The Illinois Native American Bar Association (INABA) recently filed a lawsuit against the Huntley School District for its use of "redskins" as its official school nickname, alleging violations of the Equal

[39]This article is written by James D. Boyer, a second-year law student at the Indiana University School of Law—Indianapolis, who served as an intern with the Legal Section, Indiana Department of Education, through the Law School's Program on Law and State Government.

[40]*See* "The Growing Controversy Over the Use of Native American Symbols as Mascots, Logos, and Nicknames," **Quarterly Report** January-March: 2001.

Protection Clause of the U.S. and Illinois Constitutions and Title VI of the Civil Rights Act of 1964.[41] Matthew Beaudet, president of the INABA and a member of the Illinois State Bar Association's Individual Rights and Responsibilities Section Council, commented that the school district should not have a policy that allows for the use of a derogatory name such as "redskins." He added that the word "redskins" differs from other Native American nicknames like "chieftains " and "braves" because the origin of the word refers to the practice of scalping, which dehumanizes and disparages Native American people to the same degree that other ethnic slurs offend certain ethnic or racial groups. Eventually, the school district settled the case by agreeing to drop the use of "redskins" as its school nickname and thereby avoid litigating the issue on the constitutionality of the use of the term.[42]

This has not been the first instance where public schools have responded to indignation expressed by Native American advocacy groups. The controversy will likely become more heated in light of the recent decision of the United States District Court for the District of Columbia that may potentially conclude eleven years of litigation. In Pro-Football, Inc. v. Harjo *et al.*, 284 F.Supp.2d 96 (D. D.C. 2003), a group of seven Native Americans petitioned the Trial Trademark and Appeal Board (TTAB) to cancel the use of six trademarks used by the NFL franchise Washington Redskins,[43] including the word "redskins," alleging that the trademarks violated Section 2(a) of the Lanham Trademark Act of 1946.[44] The TTAB agreed with the petitioners and concluded that the marks "may disparage Native Americans or bring them into contempt or disrepute." Harjo v. Pro-Football, Inc., 1999 TTAB LEXIS 181, 50 U.S.P.Q.2d 1705, 1749 (T.T.A.B. 1999). The district court reversed, holding that the evidence relied upon by the TTAB was insufficient to reach this conclusion but cautioned against its opinion being construed to support any statement as to the "appropriateness of using Native American imagery for team names."

The court reasoned that, although the TTAB used the correct test for disparagement that Defendants relied upon, it is important to note how Native Americans viewed the use of the term at the time it was

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[41]Helen W. Gunnarsson, Law Pulse, 90 Ill. Bar J. 168, 172 (April, 2002).

[42] Id.

[43] Team owner George Marshall changed the name of the team in 1933 from the "Boston Braves" to the "Boston Redskins" in honor of the team's head coach, William Dietz, a Native American. The name was changed to the "Washington Redskins" when the team moved to Washington, D.C. about four years later. Pro-Football, 284 F.Supp.2d 96. The court's decision in Pro-Football is over 200 pages in length.

[44]Section 2(a) of the Lanham Act reads in relevant part: "No trade-mark . . . shall be refused registration . . . on account of its nature unless it (a) [c]onsists of or comprises immoral, deceptive, or scandalous matter; or matter which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols, or bring them into contempt, or disrepute. . . ." 15 U.S.C.A. § 1052.

registered.[45] The court reasoned that the TTAB "premised its disparagement conclusion on a paucity of actual findings of fact that were linked together through inferential arguments that had no basis in the record." Specifically, the court found "no evidence in the record that addresses whether the use of the term 'redskin(s)' in the context of a football team and related entertainment services would be viewed by a substantial composite of Native Americans, in the relevant time frame, as disparaging." The court added:

> This is undoubtedly a "test case" that seeks to use federal trademark litigation to obtain social goals. The problem, however, with this case is evidentiary. The Lanham Act has been on the books for many years and was in effect in 1967 when the trademarks were registered. By waiting so long to exercise their rights, Defendants make it difficult for any fact-finder to affirmatively state that in 1967 the trademarks were disparaging.

Thus the court seemingly closed the door on further litigation on this issue at least by way of the Lanham Act.

Also, it appears that the only constitutional way in which the opposition to the use of Native American imagery can succeed in getting public schools to change from purportedly offensive names and symbols to more innocuous ones is by way of alleging a violation of the Equal Protection Clause of the Fourteenth Amendment. Roger Clegg, American Indian Nicknames and Mascots for Team Sports: Law, Policy, and Attitude, 1 Va. Sports & Ent. Law J. 274, 275. In this case, it would have to be shown that the public school possessed the discriminatory intent to harass or exclude Native Americans from attending the school. Id. at 276, citing Washington v. Davis, 426 U.S. 229 (1976). However, it is important to note that teams are not usually named after things or people who are held in contempt or with the intent to insult. Id. at 277. In fact, many Native Americans have objected to the movement to eliminate Native American references to a "sort of ethnicity cleansing."[46] Id. at 278.

Nevertheless, those opposing the use of "redskins" and other Native American imagery, especially by public schools, have utilized other means to confront the practice. In Crue v. Aiken, 204 F.Supp.2d 1130 (C.D. Ill. 2002), a group of students and faculty at the University of Illinois attempted to speak with prospective student athletes to inform them of their concerns about the university's use of Chief Illiniwek as a symbol. The group believed that the university created a hostile environment to Native Americans and presented a problem in recruiting Native American students to attend the school. In response, the chancellor issued a Preclearance Directive requiring the permission of the athletic department prior to anyone associated with the school contacting any prospective student athletes. The

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[45]The TTAB used the time between 1967 and 1990 when the trademarks were issued.

[46]A poll in the March 4, 2002 edition of *Sports Illustrated* reported that more than eighty percent of Native Americans indicated that school and professional sports teams should not cease using Native American nicknames. Clegg, *supra* at 278.

university feared the faculty contact would violate NCAA recruitment rules. The student and faculty plaintiffs filed suit requesting a declaratory judgment on the constitutionality of the Preclearance Directive in regard to their First Amendment rights to Free Speech. The district court held that the parties were entitled to declaratory judgment because the directive was not narrowly tailored to further a legitimate interest (compliance with NCAA rules) and violated the First Amendment in its prohibition on protected speech. Id. at 1142. The court reasoned that the school misinterpreted the context of the NCAA rules, believing that they applied in a broader sense to all persons that could be associated with the school when, in actuality, the rules only limited unfair recruitment by individuals acting at the direction of a member of the coaching staff or representatives of the school's athletic interests with matters relating to recruitment. Id. at 1141. Thus, the students and faculty opposed to the university's policy and continued use of "Chief Illiniwek," both as a symbol and name, were free to continue their crusade to end the practice by contacting potential future students and voicing their concerns.

The attempts at persuading public schools to cease the use of such symbols and mascots, particularly at the elementary and secondary level, and to change school and team names remain viable, especially among legislators. Congressman Frank Pallone, Jr. (D. - N.J.) sponsored H.R. 5487 entitled, the Native Act to Transform Images in Various Environments (NATIVE) Bill in September 2002. The bill is an attempt to remedy the controversy by providing schools with the incentive to change allegedly offensive Native American imagery by offering to qualifying schools a federal grant to meet the costs in making the change. The bill is still pending.

Date: _____

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